

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION – FELONY BRANCH**

UNITED STATES OF AMERICA

Criminal No. 2012-CF1-3958

v.

The Honorable Thomas Motley

**ELLSWORTH COLBERT,
Defendant.**

Trial Date: January 7, 2013

**Defendant's Statement of Opposing Points and Authorities
in Opposition to United States' *Ex Parte* Motion Under Seal
to Disqualify Damon Colbert as Defense Counsel**

Ellsworth Colbert, by and through undersigned counsel, respectfully submits this Statement of Opposing Points and Authorities to oppose the United States' motion to disqualify Damon Colbert ("Attorney Colbert") as defense counsel (the "Motion"). This Court should deny the Motion because:

- granting the Motion would deprive Ellsworth Colbert of his Sixth Amendment right to counsel of choice;
- Attorney Colbert's representation of Ellsworth Colbert does not violate Rule 3.7 of the District of Columbia Rules of Professional Conduct ("Rule 3.7"); and
- Attorney Colbert's representation of Ellsworth Colbert does not violate Rule 1.7 of the District of Columbia Rules of Professional Conduct ("Rule 1.7").

Factual Background

While standing in the front yard of his home in the 3500 block of Pope Street SE, in Washington, D.C., on the morning of March 4, 2012, Ellsworth Colbert was confronted by two younger men, one of whom was holding a pit bull terrier. The men had been smoking marijuana and sharing an alcoholic beverage. Ellsworth Colbert knew the man holding the pit bull and recognized the dog as the pit bull kept by Mr. Sean Hurd ("Hurd"). Hurd lived at [REDACTED] Highwood Drive SE, in Washington, D.C.

Concerned for his safety and that of his neighbors', Ellsworth Colbert quickly walked past the two men toward Hurd's residence. Both men and the pit bull followed him.

Ellsworth Colbert knocked on Hurd's front door until Hurd opened the door. He asked Hurd to take control of the pit bull. Hurd refused. By this time, the men and the pit bull were behind Mr. Colbert as he stood facing Hurd. Because Hurd would not help Mr. Colbert he turned and retreated to his home.

The decedent and his friend stood in front of Mr. Colbert blocking the path to his home. Trapped between Hurd and the two young men, Mr. Colbert forced his way by the decedent and began walking back to his home. The decedent was significantly larger than him. The decedent was angered by Ellsworth Colbert's escape and went to the side of Hurd's house and retrieved an iron shovel that had a long wooden shaft.

As Ellsworth Colbert walked toward his home the decedent attacked him from behind, violently striking Ellsworth Colbert several times with the shovel. The decedent hit Ellsworth Colbert in the head at least once with the iron part of the shovel.

After being struck in the head Ellsworth Colbert turned and fought for his life. During the altercation the decedent was fatally wounded, and Ellsworth Colbert

was able to escape. Although suffering from a concussion and other injuries, Ellsworth Colbert made it back to his home. He immediately called Attorney Colbert.

Attorney Colbert is an attorney licensed to practice law in the District of Columbia and the Commonwealth of Virginia. Since October 2001, Ellsworth Colbert has sought legal advice from Attorney Colbert concerning a myriad of matters. Since March 4, 2012, the date of the attack on Mr. Colbert, Attorney Colbert has provided legal advice and assistance to Mr. Colbert as he prepares for trial. At or about 10:15 a.m. on March 4, 2012, Mr. Colbert used his cellphone to call Attorney Colbert multiple times to seek legal advice.

In April 2012, Attorney Colbert complied with a subpoena requiring him to testify before the grand jury investigating, among other things, the March 4, 2012, incident. During the course of his grand jury testimony, he asserted the attorney-client privilege in response to questions posed by Robert Feitel, counsel for the United States, regarding his communications from and with Ellsworth Colbert before and on March 4, 2012, particularly the contents of a March 4 voice message and phone conversation. Samuel Bogash provided legal counsel to Attorney Colbert concerning his testimony before the grand jury.

On May 16, 2012, [REDACTED] (the "Witness")¹, who is [REDACTED]
[REDACTED], told Attorney Colbert a Metropolitan Police Department detective's business card was left at the Witness's home. At 11:16 p.m. on May 16, Attorney Colbert sent an SMS message to the detective's cellphone asking the detective to contact him regarding any information the detective needs from the Witness. At 12:02 a.m. on May 17, the detective responded via SMS

¹ This witness is identified in the Motion.

message: "I will have AUSA Fietel [*sic*] contact you." Robert Feitel never contacted Attorney Colbert.

On June 18, 2012, the United States sent a subpoena compelling the Witness to testify before the grand jury to Samuel Bogash, the lawyer who represented Attorney Colbert concerning his grand jury testimony. Mr. Bogash did not represent the Witness.

On June 19, 2012, Attorney Colbert sent an email to Attorney Nikki Lotze, a copy of which is attached as *Exhibit A*, to determine if she could represent the Witness for the grand jury proceedings. Shortly after June 19, Ms. Lotze became the Witness's lawyer.

On October 11, 2012, Attorney Colbert ended Samuel Bogash's representation of him concerning the grand jury proceedings because Ellsworth Colbert was indicted on October 10, 2012. A redacted copy of his email to Mr. Bogash is attached as *Exhibit B*.²

Before May 19, 2012, Attorney Colbert had legal visits with Ellsworth Colbert at the D.C. Jail. On May 19 D.C. Jail officials denied Attorney Colbert access to Ellsworth Colbert. Those officials told Attorney Colbert that because he was not the "attorney of record," he could not have legal visits with Ellsworth Colbert. Between May 20 and November 9, 2012, Ellsworth Colbert, on multiple occasions, sought legal counsel from Attorney Colbert. But Attorney Colbert could not communicate directly with Ellsworth Colbert about legal matters because he had not entered his appearance in this case, which means he was precluded by D.C. Jail officials from having legal visits with Ellsworth Colbert.

² At the December 14, 2012, status hearing for this case, assistant United States attorney Edward O'Connell told the Court he was "skeptical" of Attorney's Colbert's statement to the Court that he was no longer represented by counsel. We know of no basis for Mr. O'Connell's skepticism. We believe *Exhibit B* shows—and any testimony Mr. Bogash may provide regarding his representation of Attorney Colbert will show—that Attorney Colbert did not mislead the Court.

Between October 10 and November 8, 2012, Attorney Colbert, who is unfamiliar with the customary practices of prosecutors, sought the opinion of Samuel Bogash, his former counsel and an experienced criminal defense lawyer, as to whether he would be called as a witness at Ellsworth Colbert's trial. Mr. Bogash opined informally that Attorney Colbert would not be compelled to testify. But on November 8, Mr. Bogash informed Attorney Colbert that prosecutors had contacted him to let him know that Attorney Colbert would be served with a subpoena to testify at trial.

Attorney Colbert decided not to allow the prosecutors' purported plan to deter him from his primary purpose in this case: to provide legal counsel to Ellsworth Colbert. In April 2012, Mr. Bogash had told Attorney Colbert on multiple occasions that a prosecutor in this case intended to have one of Attorney Colbert's relatives served with a subpoena requiring that person to testify before the grand jury. To Attorney Colbert's knowledge, that person was never served. Based on Attorney Colbert's knowledge of that prosecutor's failure to do what he said he would do concerning Attorney Colbert's relative, Attorney Colbert believed that there was a chance that he would not be served with a subpoena to testify at trial. Attorney Colbert proceeded with his plan to enter his appearance in this case, which would enable him to have legal visits with Ellsworth Colbert.

On the evening of November 8, 2012, Attorney Colbert contacted ethics lawyers at both the Virginia State Bar and the District of Columbia Bar to seek informal advice about whether his representation of Ellsworth Colbert would implicate the Virginia equivalent of Rule 3.7 and Rule 3.7.³ On November 9, Attorney Colbert received confirmation from an ethics lawyer from each jurisdiction that his planned course of action would raise no issues.

³ Attorney Colbert did not reveal Ellsworth Colbert's identity or any other confidential information.

The timing of the government's actions is significant. At approximately 4:48 p.m. on November 9, 2012, Attorney Colbert entered his appearance as counsel to Ellsworth Colbert in this case. Attached as *Exhibit C* is a copy of an email Attorney Colbert received at 5:03 p.m. on November 9 from Mr. Bogash that included as an attachment a PDF copy of the subpoena compelling Attorney Colbert to testify as a witness for the United States at Ellsworth Colbert's trial.

Shortly after November 9, 2012, Attorney Colbert resumed his legal visits with Ellsworth Colbert.

On November 30, 2012, Google Inc. informed Attorney Colbert that it had received legal process from the United States Attorney's Office for the District of Columbia regarding information in or relating to his personal email account. Consequently, Attorney Colbert filed a motion to quash the United States' subpoena to Google Inc. on December 4, 2012.

On December 13, 2012, the United States filed the Motion.

After the status hearing in this Court on December 14, 2012, Attorney Colbert sought and retained legal ethics counsel to advise him on the allegations made in the Motion. After consulting with legal counsel, Attorney Colbert remains confident that he does not have to withdraw from this case.

1. The Sixth Amendment of the United States Constitution Guarantees Ellsworth Colbert the Right to Counsel of His Choice

A. The United States has neither demonstrated an actual conflict nor shown a serious potential for conflict, so the Sixth Amendment presumption in favor of counsel of choice should be preserved in this case

Attorney Colbert's representation of Ellsworth Colbert does not pose a conflict of interest. The United States manufactures an implausible conflict in an attempt to disqualify Attorney Colbert by arguing that Attorney Colbert's representation of the Witness in this case presents a conflict. The United States' argument is specious and unsupported by the facts. First, the scope of Attorney Colbert's representation of the Witness was limited. No more than 24 hours after Attorney Colbert received a subpoena compelling the Witness to testify before the grand jury, Attorney Colbert referred the Witness to Attorney Nikki Lotze, who could competently advise the Witness concerning grand jury matters. Attorney Colbert's representation of the Witness ended when Ms. Lotze was retained.

The United States has not demonstrated that an actual conflict exists. "An actual conflict in successive representation may arise where the subject matter of the previous representation is substantially related to the case being tried, the attorney reveals privileged communications of the former client stemming from the previous representation, or the attorney's loyalties are otherwise divided." *Veney v. United States*, 738 A.2d 1185, 1193 (D.C.1999). The United States has not argued or demonstrated that Attorney Colbert revealed privileged communications of the Witness stemming from his previous representation of the Witness. And the United States has not demonstrated that Attorney Colbert's loyalties are otherwise divided.

Attorney Colbert's previous representation of the Witness is not substantially related to this case. Attorney Colbert did not represent the Witness concerning the Witness's grand jury testimony. So, the subject matter of the representation is different from this case. In deciding what it means for a previous representation to be "substantially related" to a current one, the District Columbia Court of Appeals analyzed a situation where appellant's defense would necessarily involve refuting a government witness's testimony by attacking the witness's credibility on cross-examination. *Pinkney v. United States*, 851 A.2d 479, 488 (D.C. 2004). Appellant's defense counsel had represented the government witness in a prior criminal matter and was representing the government witness in other criminal matters while representing appellant when the government filed a motion to disqualify defense counsel. *See id.* at 484. The government witness would testify that appellant had made a jailhouse confession of the murder. The *Pinkney* court reasoned that "because impeachment of [the government witness] would be an important part of the defense, issues concerning [the government witness's] credibility were therefore 'substantially related' to defense counsel's representation of appellant." *Id.* at 488.

Attorney Colbert's situation regarding the Witness and Ellsworth Colbert is not similar to the facts in *Pinkney*. The United States indicates on page eight of the Motion that the Witness will be a government fact witness at trial. Based on the United States' description of the Witness's grand jury testimony on page five of the Motion, the likelihood that Ellsworth Colbert's defense would necessarily involve refuting the Witness's testimony by attacking the Witness's credibility on cross-examination is remote, if existent at all. In *Pinkney*, the government witness's testimony would have incriminated the appellant. Here, based on the United States' description of the Witness's grand jury testimony, that testimony would not incriminate Ellsworth Colbert. Government fact witnesses who claim to be eyewitnesses of the March 4, 2012, incident may have their credibility attacked on

cross-examination. But based on page five of the Motion, the Witness does not appear to have been an eyewitness on March 4. The *Pinkney* court's rationale does not apply here. Attorney Colbert's previous representation of the Witness is not substantially related to this case.

In addition to the United States' failure to show that an actual conflict exists, it has not shown that a serious potential for conflict exists. The *Pinkney* court stated, "[t]his court has never articulated a test by which a trial court may determine whether a potential conflict reaches the point at which disqualification is warranted." *Id.* at 487. Adopting the Seventh Circuit's analysis on this issue, the *Pinkney* court reasoned that "the trial court should 'examine whether the subject matter of the first representation is substantially related to that of the second,' whether 'the conflict could cause the defense attorney improperly to use privileged communications in cross-examination,' and whether 'the conflict could deter the defense attorney from intense probing of the witness on cross-examination to protect privileged communications with the former client . . .'" *Id.* The subject matter of Attorney Colbert's representation of the Witness is not substantially related to Attorney Colbert's representation of Ellsworth Colbert. To Attorney Colbert's knowledge, Attorney Lotze represented the Witness in this case. Attorney Colbert's representation of Ellsworth Colbert concerns this case. No conflict exists that could cause Attorney Colbert improperly to use privileged communications in cross-examination of the Witness. Further, Attorney Colbert will not address any witnesses or the jury at trial; James Beane is trial counsel for Ellsworth Colbert. Similarly, no conflict exists that could deter Attorney Colbert from intense probing of the Witness on cross-examination to protect privileged communications with the Witness. Attorney Colbert will not cross-examine any witnesses at trial.

Because the United States has neither demonstrated an actual conflict nor shown a serious potential for conflict, the Sixth Amendment presumption in favor of counsel of choice should be preserved in this case.

B. This Court should not preclude Attorney Colbert from representing Ellsworth Colbert in pretrial and posttrial matters as any appearance of impropriety does not outweigh Mr. Colbert's Sixth Amendment right to counsel of his choice

We recognize that this Court has an obligation to ensure that there is no appearance of impropriety at trial. We are unable to find any relevant case that suggests that Attorney Colbert's representation of Ellsworth Colbert may lead to an appearance of impropriety. But if the Court concludes that Attorney Colbert's presence at the defense table at trial would create an appearance of impropriety, we believe this Court should not preclude Attorney Colbert from representing Ellsworth Colbert in pretrial matters and posttrial matters. Attorney Colbert has counseled Ellsworth Colbert regarding this case since its inception and plays a vital role on Ellsworth Colbert's legal team.

2. Attorney Colbert's Representation of Ellsworth Colbert Does Not Violate Rule 3.7

A. Because Attorney Colbert will not act as an advocate at Ellsworth Colbert's trial, Attorney Colbert cannot violate Rule 3.7

Rule 3.7(a) states, in pertinent part, "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness . . ." D.C. RPC Rule 3.7. Comment two to Rule 3.7 clarifies the meaning of "advocate": "an advocate is expected to explain and comment on evidence given by others." *Id.* Attorney Colbert

will not act as advocate at Ellsworth Colbert's trial.⁴ Attorney Colbert retained James Beane on Ellsworth Colbert's behalf for that purpose. Only James Beane will explain and comment on evidence given by others at trial.

The United States' reliance on *Coleman v. United States*, 948 A.2d 534 (D.C. 2008), to support its argument that Attorney Colbert's representation violates Rule 3.7 is misplaced. In arguing that an assistant United States attorney should not have been allowed to testify in the trial court, an appellant in *Coleman* relied on an Eighth Circuit case in which a defendant's conviction was reversed because an assistant United States attorney trying the case before the jury testified for the government. *See Coleman*, 948 A.2d at 546. That appellant also relied on Rule 3.7(a). *See id.* The *Coleman* court reasoned that the appellant's reliance on the Eighth Circuit case and Rule 3.7(a) was misplaced because the lawyer that testified in appellant's case did not personally try that case. *See id.* Here, Attorney Colbert will not personally try Ellsworth Colbert's case. If this Court applies the *Coleman* court's reasoning, then it should conclude that Attorney Colbert's representation does not violate Rule 3.7.

B. Disqualification is unnecessary at this stage of the case because Rule 3.7 is concerned with counsel who will be both an advocate and witness at trial

We concede that Attorney Colbert's presence at the defense table at trial coupled with his testifying on the witness stand would be atypical. If this Court decides that Attorney Colbert's presence at the defense table makes him an "advocate" under Rule 3.7, then this Court should only disqualify him from serving as counsel to

⁴ Attorney Colbert's statement to the Court during the December 14, 2012, status hearing that he serves as "strategic counsel" to Ellsworth Colbert is consistent with this statement.

Ellsworth Colbert at trial. Pretrial and posttrial matters are beyond the scope of Rule 3.7.

Courts in other jurisdictions have reasoned that attorneys who would violate their jurisdiction's equivalent of Rule 3.7 at trial can still represent their clients in pretrial and posttrial matters. *See, e.g., Droste v. Julien*, 477 F.3d 1030, 1036 (8th Cir. 2007) (stating that “[b]ecause [the Missouri equivalent of Rule 3.7] on its face does not apply to pretrial proceedings, we believe the district court abused its discretion in making the disqualification motion effective immediately”); *Culebras Enters. Corp. v. Rivera-Rios*, 846 F.2d 94, 99 (1st Cir. 1988) (interpreting Rule 3.7 of the Model Rules of Professional Conduct of the American Bar Association and concluding that its prohibition against acting as “advocate at a trial” should not be read as broadly prohibiting the rendition of case-related out-of-court services prior to trial); and *Caplan v. Braverman*, 876 F. Supp. 710, 711 (E.D. Pa. 1995) (holding that the language of the Pennsylvania equivalent of Rule 3.7 does not require a lawyer to be disqualified from representing a client even if that rule is violated and concluding that a lawyer who violates that rule can represent a client in all pretrial and posttrial matters). While we do not believe Attorney Colbert’s representation of Ellsworth Colbert violates Rule 3.7, if this Court disagrees with our analysis and conclusion concerning Rule 3.7’s applicability here, this Court should permit Attorney Colbert to represent Ellsworth Colbert in pretrial and posttrial matters.

3. Attorney Colbert's Representation of Ellsworth Colbert Does Not Violate Rule 1.7⁵

A. Attorney Colbert will not advance two or more adverse positions in this case

"Rule 1.7(a) applies only to situations where a lawyer *actually* asserts two incompatible arguments on behalf of two different clients on the same issue in the same proceeding . . ." *Iacangelo v. Georgetown Univ.*, 710 F. Supp. 2d 83, 89 (D.D.C. 2010) (citing D.C. Bar Legal Ethics Comm., Op. 217).⁶ Attorney Colbert has neither actually asserted nor will he actually assert two incompatible arguments on behalf of two different clients on the same issue in this case. In fact, Attorney Colbert will not assert any arguments at trial. If the United States requires him to take the stand as a fact witness, he will testify as to facts within his personal knowledge. Attorney Colbert will not make legal arguments to the jury at Ellsworth Colbert's trial. Further, Ms. Lotze, not Attorney Colbert, represented the Witness concerning Witness's testimony to the grand jury. Consequently, Attorney Colbert asserted no arguments on behalf of the Witness regarding the grand jury. Because Attorney Colbert will not advance two or more adverse positions in this case, Attorney Colbert's representation of Ellsworth Colbert does not violate Rule 1.7(a).

B. The United States' assertion that Attorney Colbert's representation of Ellsworth Colbert violates Rule 1.7 is supported by no facts whatsoever and fails to demonstrate that the provisions of Rule 1.7 are implicated

This Court should reject the United States' assertion that Attorney Colbert's representation of Ellsworth Colbert violates Rule 1.7. Here is the United States' argument concerning Rule 1.7:

⁵ Rule 1.7 is set forth on *Exhibit D*.

⁶ D.C. Rule of Professional Conduct 1.7(a) states: "A lawyer shall not advance two or more adverse positions in the same matter."

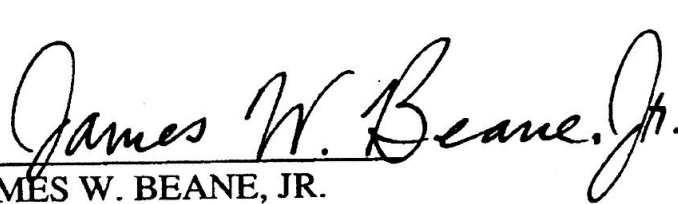
Here, it is apparent to the United States that Damon Colbert's representation of Defendant Colbert violates section 1.7. That is, to the extent that Damon Colbert represents his father, Defendant Colbert, and has represented [REDACTED], as a witness in the case, as well as the fact that he himself will be a fact witness in the case, those interests are adverse to one another. Damon Colbert's professional judgement [*sic*] on behalf of his client, Defendant Colbert, will be or reasonably adversely affected by his responsibilities or interests to a third party, that is [REDACTED], and/or his own personal interest as a witness in the case.

Pages 9-10 of the Motion. This argument—three conclusory statements, the last of which is incoherent—is meritless. The United States is theorizing when it states “those interests are adverse to another.” In *Alexander v. FBI*, 186 F.R.D. 21 (D.D.C. 1998), the court rejected plaintiffs' contention that two law firms violated Rule 1.7 because plaintiffs' “bare theories are supported by no facts whatsoever” and because plaintiffs “submit[ed] no evidence of any conflict.” *Id.* at 32. This Court should use the same reasoning to reject the United States' assertion concerning Rule 1.7 implications.

Conclusion

Because the Sixth Amendment presumption in favor of counsel of choice should be preserved in this case, Attorney Colbert's representation of Ellsworth Colbert does not violate Rule 3.7, and Attorney Colbert's representation of Ellsworth Colbert does not violate Rule 1.7, this Court should deny the United States' *Ex Parte* Motion Under Seal to Disqualify Damon Colbert as Defense Counsel.

Respectfully submitted,

 DDC

December 17, 2012

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December 17, 2012

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(703) 594-1280
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Counsel for Defendant

Exhibit A



Damon Colbert <[REDACTED]>

Referral from James Beane.

Damon Colbert <[REDACTED]>

Tue, Jun 19, 2012 at 10:48 AM

To: "nlotze [REDACTED]" <[REDACTED]>

Ms. Lotze:

James Beane suggested that I contact you about providing counsel to [REDACTED] during a grand jury proceeding that AUSA O'Connell scheduled for June 25 at 11 a.m.

[REDACTED]

[REDACTED] I am not experienced in criminal matters.
The USAO served my lawyer last night with the grand jury summons for [REDACTED].

Damon Colbert
202-905-2855

Exhibit B



Damon Colbert <[REDACTED]>

Fwd: Your Father's Case

1 message

Damon Colbert <[REDACTED]>

Mon, Oct 22, 2012 at 4:25 PM

To: Samuel Bogash <[REDACTED]>, Samuel Bogash

<[REDACTED]>

[REDACTED]

----- Forwarded message -----

From: Damon Colbert <[REDACTED]>

Date: Thu, Oct 11, 2012 at 5:51 PM

Subject: Re: Your Father's Case

To: Samuel Bogash <[REDACTED]>

Thanks, Sam---for your response and for your pro bono counsel.

[REDACTED]

You should consider your representation of me for this matter to be concluded.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Exhibit C



Damon Colbert <[REDACTED]>

Fwd: Trial Subpoena for Damon Colbert

Samuel Bogash <[REDACTED]>

Fri, Nov 9, 2012 at 5:03 PM

To: Damon Colbert <[REDACTED]>, James Beane

<[REDACTED]>

Here is a copy of the subpoena. Notice that it is also a request for documents. Specifically anything related to the autopsy of Wright. Why does he think that you have any?

Begin forwarded message:

From: "OConnell, Edward (USADC)"

<Edward.O'Connell@usdoj.gov>

Date: November 9, 2012 4:12:19 PM EST**To:** "Samuel Bogash [REDACTED]"

<[REDACTED]>

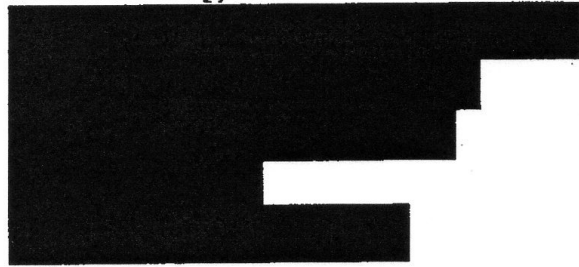
Subject: FW: Trial Subpoena for Damon Colbert

Mr. Bogash,

As we discussed over the telephone this morning, thank you for agreeing to accept service on behalf of Damon Colbert, of the attached trial subpoena.

*Edward A. O'Connell**Assistant United States Attorney**United States Attorney's Office for the District of Columbia**555 Fourth Street NW**Homicide Section - Room 9417**Washington, DC 20530**(202) 252-7420**Edward.O'Connell@usdoj.gov*

Samuel Bogash



 **Colbert, Damon Trial Subpoena for 1-7-13.pdf**
137K

Exhibit D

D.C. Rule of Professional Conduct 1.7

Rule 1.7—Conflict of Interest: General Rule

- (a) A lawyer shall not advance two or more adverse positions in the same matter.
- (b) Except as permitted by paragraph (c) below, a lawyer shall not represent a client with respect to a matter if:
 - (1) That matter involves a specific party or parties and a position to be taken by that client in that matter is adverse to a position taken or to be taken by another client in the same matter even though that client is unrepresented or represented by a different lawyer;
 - (2) Such representation will be or is likely to be adversely affected by representation of another client;
 - (3) Representation of another client will be or is likely to be adversely affected by such representation;
 - (4) The lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests.
- (c) A lawyer may represent a client with respect to a matter in the circumstances described in paragraph (b) above if
 - (1) Each potentially affected client provides informed consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation; and
 - (2) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.
- (d) If a conflict not reasonably foreseeable at the outset of representation arises under paragraph (b)(1) after the representation commences, and is not waived under paragraph (c), a lawyer need not withdraw from any representation unless the conflict also arises under paragraphs (b)(2), (b)(3), or (b)(4).

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Defendant's Statement of Opposing Points and Authorities in Opposition to United States' *Ex Parte* Motion Under Seal to Disqualify Damon Colbert as Defense Counsel was mailed and emailed to Robert J. Feitel and Edward A. O'Connell, Counsel for the United States of America, this 17th day of December, 2012.

A handwritten signature in black ink, appearing to read "Damon Colbert", written over a horizontal line.

DAMON D. COLBERT (D.C. Bar No.476938)

Counsel for Defendant